IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-939

Filed: 3 November 2020

Cabarrus County, No. 14 CRS 54781

STATE OF NORTH CAROLINA

v.

MARIE ELIZABETH BUTLER, Defendant.

Appeal by Defendant from judgment entered 10 October 2018 by Judge Martin B. McGee in Superior Court, Cabarrus County. Heard in the Court of Appeals 31 March 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas W. Yates, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Candace Washington, for Defendant.*

McGEE, Chief Judge.

Marie Elizabeth Butler ("Defendant") appeals from a judgment entered upon a jury verdict finding her guilty of communicating threats. On appeal, Defendant argues that the trial court erred by declining to give her proposed jury instruction on

the lawfulness of a conditional threat. We hold that the trial court committed no error.

## I. Factual and Procedural History

The evidence presented at trial tended to show that on the afternoon of 17 September 2014, Defendant drove to Cabarrus Charter Academy to pick up her neighbor's child from school. The principal of the school, Kevin Senter ("Mr. Senter"), testified that he received a call on his radio that someone without an appropriate school-assigned placard had arrived in the carpool line to pick up a student before that student's dismissal time and was refusing to drive around, in contravention of the school's dismissal procedure. Mr. Senter approached Defendant's car, introduced himself, reminded Defendant of the school's staggered dismissal procedure, and asked Defendant to drive around again and get back in the carpool line. Defendant became "verbally combative" and refused to move her car. After Defendant rejected Mr. Senter's proposal for her to pull into a designated parking spot while he personally retrieved the student from the school, Mr. Senter went back into the school, confirmed that Defendant was not on the student's authorized pick up list, and asked his assistant to call the police.

Officer Tammy Drye ("Officer Drye") of the Concord Police Department arrived at the school at approximately 3:30 p.m. and talked with Mr. Senter. Officer Drye testified that when she and Mr. Senter approached Defendant's car, Defendant told

her, "[t]his doesn't involve you" and raised her left hand to block her view of Officer Drye. Mr. Senter asked Defendant to leave campus property; however, Defendant "continued to be argumentative and cursing and just very upset" and refused to present her driver's license or step out of her car.

Officer Drye testified that she reached her right hand into Defendant's car to unlock the door. Defendant used her left hand to grab Officer Drye's arm, pulled her own right arm back in a closed fist, and said, "I am going to punch you in your f---ing face, b----." In response, Officer Drye "kind of jumped into the window" and used her left hand to grab Defendant's right wrist "to stop [Defendant] from punching[.]" During the struggle, Officer Drye was able to hit the distress button on her radio and, with the help of Mr. Senter, she requested that only one unit of backup report to the scene. Approximately five minutes later, another officer arrived and aided Officer Drye in removing Defendant from the car. Defendant was placed in handcuffs and arrested.

Defendant testified that on 17 September 2014, she was sick in bed until she left to pick up her neighbor's child from school. Upon pulling into the carpool line at Cabarrus Charter Academy, Defendant was informed that she was too early to pick up the child and was asked to pull around. Defendant explained that she needed to get home because she was expecting a call from her doctor's office and asked the parking volunteer to retrieve the child. When the volunteer accused Defendant of

acting "selfish," an argument ensued. As various other school officials approached Defendant's car and asked her to move, Defendant "calmly" spoke with them and "explain[ed] the whole situation."

Defendant also testified, "I don't like being involved with officers" so, when Officer Drye arrived on the scene, Defendant put her hand up. Officer Drye asked Defendant for her identification but, before Defendant could retrieve it, Officer Drye reached her hand in Defendant's car window to unlock the door. Defendant "put [her] hand across the panel of buttons" and Officer Drye responded by bending Defendant's hand backwards and twisting her arm. Defendant "put [her] fist up and told [Officer Drye] [she] was going to punch [Officer Drye] in the face." Defendant explained that she only made that threat "because [Officer Drye] wouldn't let [her] arm go." Another arrived and "yanked [Defendant] out [of] the car."

Defendant was charged with communicating threats, resisting a public officer, disorderly conduct, second-degree trespass, and assault on a government official. The charges were heard in District Court, Cabarrus County, and Defendant was found guilty of all charges except assault on a government official.

Defendant appealed to Superior Court, Cabarrus County, where the charges were tried before a jury on 8 October 2018. Defendant filed a proposed modification to the pattern jury instruction for communicating threats, N.C.P.I.—Crim. 235.18, and argued for the special instruction at the charge conference. Defendant requested

the trial court instruct the jury on conditional threats and proposed the following italicized language to the pattern charge: "And Fifth, that the threat was made without lawful authority. *A threat that is conditional in nature would be [] lawful, so long as the person making the threat had a right to impose such a condition.*" Defendant argued the instruction was supported by her testimony that she told Officer Drye, "if you don't let me go, I'm going to punch you in the f-ing face, B" and her testimony explaining that "the only reason she said it is because the officer was bending her arm back." The State argued that there was no evidence that Defendant made a conditional threat to Officer Drye. The trial court asked the court reporter to read a portion of Defendant's testimony to discern if there was any evidence that Defendant made a conditional threat. Finding no evidence that Defendant made a conditional threat, the trial court declined to give Defendant's proposed instruction.

The trial court instructed the jury on the charges of communicating threats, resisting a public officer, disorderly conduct, and second-degree trespass. After the jury deliberated, the jury foreman announced that the jury had reached a unanimous verdict for the charges of communicating threats and disorderly conduct; however, the jury was deadlocked on the other two charges. The jury returned verdicts finding Defendant guilty of communicating threats and not guilty of disorderly conduct; the trial court declared a mistrial on the remaining charges.[1] Defendant was sentenced

[1] The State ultimately dismissed the charges of resisting a public officer and second-degree trespass.

to forty-five days imprisonment, suspended for a term of 12 months supervised probation with a special condition of obtaining a mental health evaluation. Defendant appeals.

## II. Analysis

Defendant contends the trial court's refusal to instruct the jury in accordance with her proposed, modified instruction for the charge of communicating threats was error. Specifically, Defendant argues the trial court erred by denying her request to instruct the jury that conditional threats may be lawful "so long as the person making the threat had a right to impose such condition." We disagree.

Defendant filed a written request for a special jury instruction; as a result, this issue has been preserved for appellate review. *State v. Montgomery*, 331 N.C. 559, 570, 417 S.E.2d 742, 748 (1992). We review the trial court's decision regarding jury instructions *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

"It is well settled that the trial court must give the instructions requested, at least in substance, if they are proper and supported by the evidence." *State v. Edwards*, 239 N.C. App. 391, 392, 768 S.E.2d 619, 620 (2015). "When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most

favorable to defendant." *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988) (citations omitted).

At the charge conference, the trial court declined to instruct the jury on Defendant's proposed instruction on the basis that there was no evidence that Defendant made a conditional threat to Officer Drye. A review of the transcript shows that on cross-examination, Defendant testified, "[I t]old [Officer Drye] I was going to punch her in the face if she didn't let my arm go." Moreover, when questioned about the placement of her arms during her scuffle with Officer Drye, Defendant testified, "I just had it like this (indicating). I'm going to punch you in the face if you don't let my arm go." Considering this evidence in the light most favorable to Defendant as we are required to do, we hold this evidence was sufficient to support an instruction on a conditional threat. *See Carrington v. Emory*, 179 N.C. App. 827, 829, 635 S.E.2d 532, 534 (2006) ("Essential to the analysis of the second element, whether the charge requested was supported by the evidence, the evidence must be considered in the light most favorable to the party requesting the jury instruction.").

We must next determine whether the proposed instruction presented by Defendant is a correct statement of the law. Defendant was convicted of communicating threats in violation of N.C. Gen. Stat. § 14-277.1:

> (a) A person is guilty of a Class 1 misdemeanor if *without lawful authority*:

> (1) He willfully threatens to physically injure the person or that person's child, sibling, spouse, or dependent or willfully threatens to damage the property of another;
>
> (2) The threat is communicated to the other person, orally, in writing, or by any other means;
>
> (3) The threat is made in a manner and under circumstances which would cause a reasonable person to believe that the threat is likely to be carried out; and
>
> (4) The person threatened believes that the threat will be carried out.

N.C. Gen. Stat. § 14-277.1 (2019) (emphasis added).

Defendant argues that her proposed instruction is supported by *State v. Roberson*, 37 N.C. App. 714, 247 S.E.2d 8 (1978). In that case, the defendant's rose bushes grew onto the property of her neighbor, Mrs. Ives, and obstructed Mrs. Ives' driveway. *Id.* at 715, 247 S.E.2d at 9. When Mrs. Ives asked another neighbor to trim the bushes growing on her property, the defendant came out of her house and demanded the neighbor stop. *Id.* Mrs. Ives tried to explain that they would only trim her bushes enough to allow Mrs. Ives access to her car; however, the defendant "wouldn't hear of it and started one of her tantrums," causing Mrs. Ives and her neighbor to retreat onto Mrs. Ives' porch. *Id.* The defendant "came onto Mrs. Ives' driveway, picked up a rock, and told Mrs. Ives, 'If you come any closer, I will hit you with it.'" *Id.* On appeal, the defendant argued that she did not violate N.C. Gen.

Stat. § 14-277.1 "because her threat to Mrs. Ives, though completed, was a conditional threat made under circumstances such that it did not actually amount to a threat." *Id.*

This Court explained that the defendant had no right to impose the condition "[i]f you come any closer" because "Mrs. Ives had the legal right to be on her own land and to trim [the] defendant's rose bushes to the extent they were hanging over Mrs. Ives's land." *Id.* at 716, 247 S.E.2d at 9–10. (citation omitted). "Applying principles long established in cases involving assault," this Court held that a "defendant may be held liable under G.S. 14-277.1 for conditional threats where, as here, the condition is one which she had no right to impose." *Id.* at 716-17, 247 S.E.2d at 10 (internal citations omitted).

Despite Defendant's assertion, *Roberson* did not hold that "[a] threat that is conditional in nature would be [] lawful, so long as the person making the threat had a right to impose such a condition." N.C. Gen. Stat. § 14-277.1, the statute at issue in *Roberson* and the present case, provides in pertinent part that a person is guilty of the offense "if without lawful authority . . . , [sh]e willfully threatens to physically injure the person or that person's child, sibling, spouse, or dependent or willfully threatens to damage the property of another." N.C. Gen. Stat. § 14-277.1(a)(1). Therefore, because the statutory language is solely concerned with the lawful authority of the person making the threat, we interpret the language in *Roberson*

that a "defendant may be held liable under G.S. 14-277.1 . . . where . . . the condition is one *which she had no right to impose*" to mean a "defendant may be held liable under G.S. 14-277.1 . . . where . . . the condition is one *which she had no lawful authority to impose*."

As support for her proposed instruction, Defendant incorporates her separate charge of resisting a public officer in violation of N.C. Gen. Stat. § 14-223. Under N.C. Gen. Stat. § 14-223, "[i]f any person shall willfully and *unlawfully* resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor." N.C. Gen. Stat. § 14-223 (2019) (emphasis added). In accordance with N.C.P.I.—Crim. 230.32, the pattern jury instruction for Resisting, Delaying, or Obstructing an Officer, the trial court instructed the jury, in pertinent part:

> . . . and fifth, that the defendant acted willfully and unlawfully, that is intentionally and without justification or excuse. The defendant's resistance, delay and obstruction, if any, is excused if it was in response to excessive force by an officer because such resistance, delay and obstruction in that event would not be unlawful. . . . *If either officer used more force than was apparently necessary to him or her or unreasonable under all the circumstances, and if the defendant's resistance, delay, and obstruction was to the excessive force used by the officers, then the defendant is not guilty of this offense.*

(Emphasis added).

Defendant argues that if the jury found that Officer Drye used excessive force, Defendant's actions in response would not be "unlawful" under N.C. Gen. Stat. § 14-223, which would bestow upon her the "authority" under N.C. Gen. Stat. § 14-277.1(a) to impose the condition that she be released from Officer Drye's excessive force. Indeed, an officer's use of excessive force may excuse a defendant's resistance, obstruction, or delay under N.C. Gen. Stat. § 14-223 because in that context, the defendant's actions would not be unlawful; however, there is no similar provision excusing a defendant's lack of lawful authority to communicate a conditional threat under N.C. Gen. Stat. § 14-277.1. In other words, a defendant is not criminally liable for resisting arrest when excessive force is used does not imbue a defendant with the separate positive legal authority to control a police officer's conduct through threat of violence.

Moreover, because N.C. Gen. Stat. § 14-223 mandates that a defendant's act of resisting, delaying or obstructing be done "willfully and unlawfully," N.C.P.I.—Crim. 230.32 reflects that the State must prove that "the defendant acted willfully and unlawfully, that is intentionally and without justification or excuse." N.C.P.I.—Crim. 230.32. In contrast, because N.C. Gen. Stat. § 14-277.1 requires that a defendant's act of communicating a threat be done "without lawful authority" and "willfully[,]" the pattern jury instruction reflects that the State must prove that the "defendant willfully threated to physically injure the alleged victim" and "that the threat was

made without lawful authority." N.C.P.I.—Crim. 235.18. However, under Defendant's modified instruction, for the charge of communicating threats, the State would have the added burden of proving that Defendant's threat was "unlawful," that is "without justification or excuse." Defendant cites no basis in law to justify the addition of this element to the charge of communicating threats.

We hold that Defendant's proposed instruction is not a correct statement of the law under *Roberson*, as *Roberson* speaks to a person's lawful authority to communicate a threat. Moreover, based on the plain language of the relevant statutes, we hold that "unlawfully" under N.C. Gen. Stat. §14-223 and "without lawful authority" under N.C. Gen. Stat. §14-277.1 are distinct legal terms of art. The trial court recognized this distinction at the charge conference when it rejected Defendant's proposed instruction and stated, "if you want to propose language for when someone has lawful authority to do something, . . . I could explain that." As a result, we hold that the trial court did not err in declining to adopt Defendant's proposed instruction that was not supported by the law.

## III. Conclusion

For the reasons discussed above, we hold the trial court did not err by refusing to give Defendant's requested instruction.

NO ERROR.

Judges INMAN and BERGER, JR. concur.

Report per Rule 30(e).